

District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80306 (303) 441-3744	DATE FILED: January 14, 2015 CASE NUMBER: 2014CV30047
<p><b>THE CITY OF BOULDER, a home rule City and a Colorado Municipal Corporation,</b></p> <p><b>PETITIONER,</b></p> <p><b>v.</b></p> <p><b>COLORADO PUBLIC UTILITIES COMMISSION;          JOSHUA B. EPEL and PAMELA J. PATTON, in their          official capacities as members of the Commission;          GLENN A. VAAD, in his official capacity as a member          of the Commission and as successor to former          Commissioner James K. Tarpey, in his official capacity          as a member of the Commission,</b></p> <p><b>RESPONDENTS,</b></p> <p><b>and</b></p> <p><b>PUBLIC SERVICE COMPANY OF COLORADO; and          COLORADO OFFICE OF CONSUMER COUNSEL,</b></p> <p><b>INTERVENORS.</b></p>	
	Case Number: 14CV30047  Division 2 Courtroom Q
<p align="center"><b>ORDER RE: JUDICIAL REVIEW OF THE COLORADO PUBLIC UTILITIES          COMMISSION DECISIONS</b></p>	

This matter comes before the Court on the City of Boulder's (the "City" or "Boulder") Petition for Writ of Certiorari Review of Decision No. C13-1350 and Decision No. C13-1550 issued by the Colorado Public Utilities Commission (the "PUC" or the "Commission"). The City filed its Opening Brief on May 14, 2014; the PUC, Public Service Company of Colorado ("Public Service"), and Colorado Office of Consumer Counsel each filed an Answer Brief on June 25, 2014; the City filed a Reply Brief on July 23, 2014; after receiving leave of court, the PUC and Public Service each filed Sur-Reply Briefs on August 8, 2014; and the City filed a Response to Sur-Reply Briefs on August 21, 2014. On October 16, 2014, this matter was

reassigned to the undersigned judicial officer. After carefully considering the extensive pleadings filed, the exhibits, and the applicable law, the Court hereby enters the following Order:

## **I. BACKGROUND**

In November 2011, Boulder voters approved a ballot measure that authorized the creation of a municipal utility subject to certain conditions. The intended municipal utility's service area includes the City of Boulder as well as part of unincorporated Boulder County, as described in a July 2013 Boulder City Council memorandum and attached map. In August 2013, the Boulder City Council adopted a City Charter Amendment allowing the City to include non-resident customers in the City's utility service area.

Also in August 2013, the City Council adopted an ordinance that authorized the acquisition, by purchase or condemnation, of the Public Service Company's utility system that currently serves the intended municipal utility's service area. The utility system the City seeks to acquire includes four substations, power lines and poles, a 115kV transmission loop, and other facilities. Public Service correctly maintains that many of these facilities serve customers outside the City as well as customers inside the City, and are part of a larger distribution system that serves other parts of Colorado.

In November 2013, Boulder voters approved acquisition of the Public Service utility system located in the municipal utility's intended service area if bonds for the purchase of same did not exceed \$214 million.

Boulder, as a home rule city, has a constitutional right to use the power of eminent domain to create and operate a municipal utility. Colo. Const. art. XX, §§ 1 and 6. Accordingly, if Boulder were seeking to create a municipal utility to serve City of Boulder residents only, it could do so without any PUC involvement. *City of Ft. Morgan v. Colo. Pub. Utils. Comm'n*, 159 P.3d 87 (Colo. 2007). Respondents do not dispute Boulder's authority to create a municipal utility and to condemn facilities, wherever located, to create a utility that serves Boulder residents only. If Boulder residents are not satisfied with the services provided by the municipal utility, they may "demonstrate their discontent at the next municipal election." *K.C. Elec. Ass'n v. Pub. Utils. Comm'n*, 550 P.2d 871, 873 (Colo. 1976). There is no need for PUC protection because the city's electorate exercises the ultimate control over a city-run utility. *Id.* at 874.

However, when a municipal utility serves customers who are not residents of the municipality, it is subject to the same PUC control and supervision that applies to private public utility owners. *City of Lamar v. Town of Wiley*, 248 P. 1009 (Colo. 1926); *see also* Colo. Const. art. XXV (vesting the PUC with broad authority to regulate public utilities). The rationale for PUC regulation of a municipal utility serving non-residents was explained in *K.C. Electric*, 550 P.2d at 874:

When a municipally owned utility provides utility service outside the municipality, those receiving the service do not have a similar recourse on

election day. They have no effective way of avoiding the possible whims and excesses of the municipality in the absence of state regulation by the PUC.

Boulder's municipalization plans assume its utility will provide service to at least 5,800<sup>1</sup> customers who are not Boulder residents. In February 2013, Boulder sent letters to potential customers who reside outside the city limits; advising them that the city utility, if created, would provide their electrical service.

The PUC issues Certificates of Public Convenience and Necessity ("CPCN") that authorize an entity to provide electric service in a specified geographic area. Currently, Public Service holds the CPCN for the geographic area outside the City of Boulder that Boulder intends to serve with its municipal utility. The Respondents do not object to transfer of the portion of the CPCN that relates to the City of Boulder, but they do object to transferring the portion of the CPCN that relates to customers in unincorporated Boulder County. The City has reserved its right to take, by eminent domain, Public Service's CPCN, and to seek its own CPCN, to serve those customers outside the City of Boulder—the extraterritorial customers.<sup>2</sup>

## II. THE PUC DECISIONS

In May 2013, Public Service filed a Petition with the PUC requesting declaratory rulings about Boulder's stated intention to obtain the extraterritorial customers through condemnation of its CPCN and condemnation of the facilities that serve those customers. The Petition requested five declaratory orders:

- (1) If a municipal utility seeks to serve customers located outside the city's boundaries, it is subject to the certificate jurisdiction of the Commission.
- (2) The Commission has already granted to Public Service a certificate of public convenience and necessity covering the territory in Boulder County, outside the Boulder city boundaries, in which the 5,800 customers are located;
- (3) Under Colorado law, there can only be one certificated utility per geographic area;
- (4) The certificate of an existing utility cannot be taken away without due process of law which requires a hearing before this Commission and proof by substantial

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<sup>1</sup> Public Service notes that the term "5,800 customers" refers to 5,800 meters, which translates to service for over 11,000 persons. Answer Br. at 5. Since the PUC hearing, Public Service revised its estimate of affected meters to 7,015. *Id.*

<sup>2</sup> The Court notes the City's shifting position with regard to Public Service's CPCN throughout its briefings for this appeal. In its Opening Brief, the City states that it intends to acquire, by negotiation with Public Service or by eminent domain, Public Service's CPCN to serve those outside the City of Boulder. Opening Br. at 4. In its Reply Brief, the City noted that in its Petition in Condemnation in case number 2014CV30890, it did not list any portion of Public Service's CPCN in the list of property and facilities to be acquired. Reply Br. at 14. In its Response to Sur-Reply Briefs, the City states that while it did not include Public Service's CPCN in the Petition in Condemnation, it has not withdrawn the same CPCN issue from the instant appeal. Resp. to Sur-Reply at 1.

evidence that the existing certificated public utility is unwilling or unable to serve the certificated area; and

(5) The need to construct replacement facilities as a result of actions taken by a challenging utility does not constitute an inability to serve.

The City admitted the first three statements. The PUC orders at issue in this case addressed the fourth and fifth statements.

On October 29, 2013, the PUC issued Decision No. C13-0498E, that states:

Boulder's plans to condemn Public Service's CPCN to serve unincorporated Boulder County do not affect the Commission's authority over the transfer of the CPCN or the applicable standards. The statute upon which Boulder relies as granting a property interest to a CPCN, § 40-5-105, C.R.S., conditions any sale or assignment of a CPCN upon Commission approval and upon such terms and conditions as the Commission may prescribe.

PUC Decision at 10. Boulder agrees that a transfer of Public Service's CPCN to the City is subject to Commission approval. "[T]he City understands that the Commission ultimately will need to approve the transfer of the portion of the Company's CPCN that includes out of city customers." Opening Br. at 4. Boulder disagrees with the following Commission rulings:

If Boulder seeks to condemn facilities, wherever located, that Public Service currently uses, at least in part, to serve customers located outside of Boulder's city limits, this Commission must have the ability to investigate and determine how the facilities should be assigned, divided, or jointly used to protect the system's effectiveness, reliability, and safety, as well as any other matter affecting the public interest. Thus, a Commission proceeding addressing these facilities should precede a condemnation action to allow the district court to rule on the public need and value of facilities that the Commission determines may be the subject of transfer to Boulder.

The potential that Boulder may file a condemnation action to obtain Public Service's CPCN for unincorporated Boulder County does not affect the Commission's regulatory authority, the doctrine of regulated monopoly, or the standards governing transfer of Public Service's CPCN. Further, Commission proceedings addressing the transfer of Public Service's CPCN or other plant, equipment, and facilities used to provide service to customers located in unincorporated Boulder County are to be completed before Boulder initiates a condemnation action for such property.

The City filed an Application for Rehearing, Reargument, or Reconsideration. The PUC issued Decision No. C13-1550 denying that Application; it stated the Commission will decide what property rights Boulder may acquire and Boulder must obtain PUC approval before it begins a condemnation action. That decision was adopted on December 11, 2013.

These are the rulings that are the subject of this judicial review.

### **III. STANDARD OF REVIEW**

“The PUC order is equivalent to a trial court decision, and in reviewing a PUC order, the district court acts as an appellate body.” *Lake Durango Water Co. v. Pub. Utils. Comm’n*, 67 P.3d 12, 22 (Colo. 2003). The district court’s role is to “ensure that the Commission has regularly pursued its authority, that its decisions are just and reasonable and that the Commission’s conclusions are ‘in accordance with the evidence.’” *City of Montrose v. Pub. Utils. Comm’n*, 629 P.2d 619, 622 (Colo. 1981) (quoting § 40-6-115(3), C.R.S.). The party objecting to a Commission decision has the burden of proving that the decision is unlawful. *CF&I Steel, L.P. v. Pub. Utils. Comm’n*, 949 P.2d 577, 585 (Colo. 1997).

When a party challenges a Commission decision based on a violation of constitutional rights, as Boulder does here, “the district court shall exercise an independent judgment on the law and the facts.” § 40-6-115(2), C.R.S. The court decides matters of law de novo. *Pub. Serv. Co. v. Trigen-Nations Energy Co.*, 982 P.2d 316, 326 (Colo. 1999). “Upon review, the district court shall enter judgment either affirming, setting aside, or modifying the decision of the commission.” § 40-6-115(3), C.R.S.

### **IV. THE PARTIES’ POSITIONS**

The City objects vigorously to the sequence of events ordered by the Commission. The City maintains that Commission approval as a pre-condition to condemnation disregards and interferes with its constitutional right of eminent domain. Boulder asserts it should be free to proceed with eminent domain action before seeking any approval from the PUC. Boulder has reserved its right to obtain Public Service’s CPCN and facilities by condemnation.<sup>3</sup> Boulder would then seek PUC approval of an amended CPCN that is consistent with the condemnation court orders.

The Commission maintains Boulder does not have an unfettered right to condemn and acquire fundamental components of the electric grid serving communities outside Boulder. The Commission notes it is mandated to ensure safety and reliability of the statewide network. The Commission asserts it has the authority to determine which provider to certificate in unincorporated Boulder County; Boulder does not have the right to assume it will take whatever service area it deems fit to take.

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<sup>3</sup> The City filed for condemnation on July 17, 2014 and did not request condemnation of Public Service’s CPCN at that time. See *supra* footnote 2. Boulder asserts it would seek the PUC’s regulatory review following the condemnation.

## V. ANALYSIS

### A. Constitutional Authority

Boulder, a home rule city, has a constitutional right to use the power of eminent domain to create and operate a municipal utility. The Colorado Constitution expressly grants home rule cities the power, “within or without [their] territorial limits to . . . condemn and . . . operate . . . public utilities . . . and everything required therefore.” Colo. Const. art. XX, §§ 1 and 6.<sup>4</sup> The Respondents do not dispute Boulder’s authority to establish a municipal utility to serve residents within the city limits, nor do Respondents dispute Boulder’s authority to condemn property needed to create the utility that would serve Boulder’s residents, including property located outside the city limits. The Respondents do dispute Boulder’s assertion that its eminent domain power is superior to the Commission’s constitutional authority as it relates to customers located outside the City or to facilities that affect customers outside the City or the statewide utility network.

Article XXV of the Colorado Constitution vests the Commission with “all power to regulate the facilities, service and rates and charges . . . of every . . . public utility” operating within the state. Colo. Const. art. XXV. Article V, section 35 states, “[t]he general assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever.” This section has been interpreted as pertaining to public utilities operating within municipal boundaries. *City of Ft. Morgan*, 159 P.3d at 96. The PUC is vested with broad authority to regulate public utilities in this state and it has considerable discretion in its choice of the means to accomplish its functions. Colo. Const. art. XXV; § 40-4-101, C.R.S.; *Mountain States Tel. & Tel. Co. v. Pub. Utils. Comm’n*, 763 P.2d 1020 (Colo. 1988); *City of Montrose v. Pub. Utils. Comm’n*, 629 P.2d 619 (Colo. 1981).

The Court must evaluate the proper process by which to address these distinct constitutional rights under Articles XX and XXV. The Court must review the rights provided to each party under the Colorado Constitution—the City’s right to eminent domain and the PUC’s right to regulate public utilities. The pivotal question then is whether these constitutional rights in this instance are in conflict or may coexist. The Court must interpret the application of these constitutional rights under the facts of this case.

It is clear that the PUC does not have jurisdiction to exercise its authority under Article XXV when a municipality operates a utility solely within its boundaries under Article XX. *City of Loveland v. Pub. Utils. Comm’n*, 580 P.2d 381, 383 (Colo. 1978); *City and Cnty. of Denver v. Pub. Utils. Comm’n*, 507 P.2d 871, 874-75 (Colo. 1973); *Town of Holyoke v. Smith*, 226 P. 158, 161 (Colo. 1924). However, municipal utilities servicing areas outside of the boundaries of the municipality are subject to the jurisdiction of the PUC. *Loveland*, 580 P.2d at 383; *City and*

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<sup>4</sup> The City also claims a franchise and statutory right to purchase or condemn utility systems. In this case, the franchise has expired; accordingly, any rights conferred by the franchise have likewise expired. The statutory right is based on section 31-15-707, C.R.S., which provides that municipalities may acquire utility systems by purchase or condemnation after the franchise has been in effect for a given number of years.

*Cnty. of Denver*, 507 P.2d at 875. This proposition is true even if the municipality is providing service extraterritorially in connection with providing service within the city—the municipality is still treated as a privately-owned public utility. *Loveland*, 580 P.2d at 384. Therefore, the PUC’s right to regulate a public utility is of utmost importance and will not be overcome by a municipality’s exercise of its right to condemn. In assessing the operation of utilities outside the boundaries of a municipality, “the PUC must . . . be allowed the power to resolve jurisdictional disputes between municipalities and private utilities companies over who is to serve areas outside municipal boundaries.” *Id.* at 385.

The PUC’s right to exercise jurisdiction over a municipality providing services to customers outside of the municipality is important to protect those who do not have voting rights within the municipality. *See K.C. Elec.*, 550 P.2d at 874. The City characterizes the extraterritorial customers as “incidental” and asserts they represent only 3 per cent of the customer load. Originally the number of extraterritorial customers was quantified at 7,800; it has since been revised to a greater number. The Court finds the number of customers outside the city limits is neither dispositive nor persuasive for the arguments presented by the City or the PUC; what matters is the fact that Boulder seeks to include non-resident customers in its service area. Service to non-resident customers thus invokes PUC jurisdiction and regulation.

#### *B. The Doctrine of Regulated Monopoly*

“Colorado has long been dedicated to the principle of ‘regulated monopoly’ in the conduct of public utilities operations. *Pub. Serv. Co. of Colo. v. Pub. Utils. Comm’n of the State of Colo.*, 765 P.2d 1015, 1021 (Colo. 1998). “After a utility has been assigned a specific territory, no other utility may provide service in that territory unless it is established that the certificated utility is unable or unwilling to provide adequate service. Once an area has been certificated to one utility, it and it alone has the right to serve the future needs of that area provided it can do so. This is essential to the doctrine of regulated monopoly in Colorado. This exclusive right to serve an area is a property right which cannot be affected except by due process of law.” *Id.* (internal citations omitted). Therefore, only one entity may hold a CPCN to provide utilities to a designated geographic area. Public Services currently holds the CPCN to provide utilities to unincorporated Boulder. Boulder asserts it has the authority to take Public Service’s CPCN for non-residents by eminent domain. Such assertion would reduce the PUC’s authority to regulate services and facilities for those extraterritorial customers to a ministerial role. The Court finds this is not consistent with Article XXV of the Colorado Constitution or the doctrine of regulated monopoly.

#### *C. Right to Choose Property for Condemnation*

The City claims the PUC exceeded its authority when it ruled that the “[PUC] must have the ability to investigate and determine how the facilities should be assigned, divided, or jointly used to protect the system’s effectiveness, reliability, and safety, as well as any other matter affecting the public interest.” Decision at 13. Similarly, the City claims the PUC exceeded its authority when it ruled that PUC proceedings addressing the transfer of Public Service’s CPCN or other plant, equipment, and facilities used to provide service to customers located in unincorporated Boulder County are to be completed before Boulder initiates a condemnation

action for such property. *Id.* at 12. The City maintains these decisions “threaten to block or limit the electric utility project approved by the Boulder voters in 2011 and 2013. Opening Br. at 1. The City also maintains the PUC rulings “interfere with the City’s constitutional authority to acquire the electric system serving the City.” *Id.*

Boulder repeatedly characterizes the PUC action as *abrogating* its constitutional right to eminent domain. The Court is not persuaded. The PUC action only *delays* Boulder’s constitutional right to eminent domain, a delay that would necessarily occur at some point in time prior to finalizing the utility municipalization, to provide PUC its constitutional right to investigate and determine how the facilities should be assigned, divided, or jointly used to protect the system’s effectiveness, reliability, and safety, as well as any other matter affecting the public interest.

The City claims the City, not the PUC, has the right to determine which property to acquire. Boulder states “condemnation is ‘an essential part of the power of eminent domain.’” *City of Thornton v. Farmers Reservoir & Irrigation Co.*, 575 P.2d 382, 389 (Colo. 1978). The City asserts that “[i]n *Thornton v. Farmers*, the Supreme Court held that which utility assets a home rule city may condemn is a matter for the city and not the Commission.” Opening Br. at 10-11. The Court does not find the *Thornton* case stands for that proposition. *Thornton* involved a home rule city’s eminent domain action to condemn certain water and water rights, and ditches and ditch rights. *Thornton*, 575 P.2d at 382. The case examined the city’s right of eminent domain *vis a vis* the Water Rights Condemnation Act. *Id.* at 386. That Act provided for the appointment of three commissioners to determine the issue of necessity in an eminent domain action; the “commissioners” referred to were members of that three person commission. *Id.* The Act also prohibited condemnation of water rights for future use in excess of 15 years. *Id.* The cited section of *Thornton*, discusses why the Act’s provision for commissioners to determine necessity and the limit on condemnation based on the number of years are unconstitutional. *Id.* at 388-90. In *Thornton*, the Court found that the statutory authority of the appointed commissioners was unconstitutional because it conflicted with the constitutional rights of home rule cities with regard to eminent domain. *Id.* at 388. Here, the PUC is vested with its own constitutional authority to regulate public utilities, a right not conferred on the commissioners in *Thornton*. Accordingly, the PUC, a state regulatory commission vested with constitutional authority, has greater authority than the commissioners in *Thornton* and such constitutional authority is not necessarily overcome by a home rule city’s right to eminent domain when the exercise of Boulder’s right impacts extraterritorial customers and the statewide energy grid.

The City also relies on *Public Service Company of Colorado v. City of Loveland*, 245 P. 493 (Colo. 1926), to support its assertions that it has the right to choose which property to acquire and condemn. In that case, the City of Loveland brought an eminent domain proceeding against the Public Service Company to acquire an electric lighting plant owned by the company. *Id.* at 495. The city did not need all of the property owned by the company, specifically a certain substation, the real estate upon which it stood, and certain transmission lines, and excluded these items from the condemnation. *Id.* at 496. Public Service argued that the city must take the entire plant if it takes anything. *Id.* at 499. The Supreme Court disagreed, stating “the necessities and requirements of the city . . . is the determining factor as to what shall be taken.” *Id.* The Court observed the company will receive compensation for the value of what the city takes and



compensation for any damage to the residue. *Id.* This Court notes that, in this *Loveland* case, it was easy to separate the property the city wanted to take from the property it did not want to take and that the property in question was intended to provide services within the municipality. Boulder also cites to *City of Loveland*, 580 P.2d at 383: “The PUC may not interfere with municipal decisions about purchasing, selling or building public utilities facilities.” That is an accurate quote; however, Boulder fails to mention that it appears in a paragraph discussing a municipal utility operating solely within its boundaries.

The case at hand is distinguished from many of the eminent domain cases cited by the City because the property to be condemned is less identifiable. Boulder asserts it is clearly identifiable because it is the power system currently being used to deliver power to its planned service area. However, the power system is intertwined with the system that provides service to extraterritorial customers and the statewide energy grid. In making this argument, Boulder assumes it will be providing service to those customers outside of the City that receive service through the same power system.

Public Service still holds the CPCN to provide service to the extraterritorial customers. Respondents correctly maintain that Boulder cannot appropriate the Public Service customers in unincorporated Boulder County as there has been no evidence or assertion that Public Service is unable or unwilling to provide adequate service and therefore retains the right to do so.<sup>5</sup> The Court proceeds under the assumption that Public Service maintains its right to provide service outside of the municipality unless and until the PUC determines whether the CPCN will be transferred.

It is necessary for the PUC to determine which entity will be providing service outside of the City and to then determine how to best allocate the property to accomplish service to the extraterritorial customers and the statewide power grid. In the event Public Service continues serving those outside of Boulder, the Court finds that the property in question will not be easy to separate and may require technical expertise in determining the best method of separation in order to avoid negatively impacting the statewide energy grid. The PUC is best suited to exercise jurisdiction in this regard; when the General Assembly vested the PUC with this jurisdiction in the Colorado Constitution, it intended to provide a regulatory body with more expertise in administering utilities than the district court.

#### *D. Regulation of Asset Transfer and Condemnation*

In reaching its determination, the Court relies, in part, on *Colorado and Southern Railway Company v. District Court*, 493 P.2d 657 (Colo. 1972). In this case, the Colorado and Southern Railway Company filed a condemnation action in district court to acquire property for a railroad crossing that crossed the tracks of two other railroads. *Id.* at 658. The location of the crossing was subject to PUC approval. *Id.* at 659. The Colorado Supreme Court held the district court did not have subject matter jurisdiction to proceed in the condemnation case because the PUC first had to determine where the crossing would be located. *Id.* The Court stated, “the Public

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<sup>5</sup> The only assertion that Public Service is unable to provide service to extraterritorial customers is Boulder’s argument that if it obtained the CPCN for unincorporated Boulder, Public Service would be unable to provide service to those customers.

Utilities Commission . . . has the power to determine what property the condemning railroad can use as the particular point of crossing. It follows logically then that the commission—not the railroad—determines what property the railroad requires.” *Id.* at 659. The Court noted that the property had to be identified in the eminent domain complaint and the eminent domain court could not assess just compensation until the property was identified. *Id.* “Any other construction . . . would present the classic ‘cart before the horse’ situation.” *Id.*

Although in *Colorado and Southern Railway*, the property at issue was a single railroad crossing, this case provides significant support for the PUC’s authority to identify the specific property for condemnation, prior to the actual condemnation. In holding that the PUC must identify the property for condemnation, even when the subject property is minimal, it follows that the PUC would have the authority to identify the property for condemnation when there is a large amount of property in question. This holds true particularly when such property provides service to at least 5,800 extraterritorial customers and impacts the statewide energy grid over which the PUC clearly has regulatory authority.

The City attempts to distinguish the *Colorado and Southern Railway* case by arguing that the location of the railroad crossing *had* to be identified prior to the condemnation action whereas here, the location of the property for condemnation is already known. While accurate, the Court finds that *Colorado and Southern Railway* still governs the matter at hand. Although the location of the property is known, the actual facilities to be taken cannot be identified until it is known what parts of the system will be retained by Public Service; only then can the proper assets be transferred to the City.

A similar proposition requiring commission approval prior to the transfer of assets is set forth in *Mountain States Telephone and Telephone Company v. Public Utilities Commission*, 763 P.2d 1020, 1023 (Colo. 1988), which involved an asset transfer from Mountain Bell to U.S. West Direct. Mountain Bell was a telephone company regulated by the PUC and it did not obtain PUC approval prior to the asset transfer. *Id.* at 1024. The PUC ordered Mountain Bell to reacquire the assets; the Court upheld the PUC’s decision. *Id.* at 1028. Further, section 40-5-105(1), C.R.S., permits the sale, assignment, or lease of a CPCN only upon authorization by the PUC and upon the terms and conditions set forth by the PUC. Boulder seeks to serve unincorporated Boulder through transfer of the CPCN; there is no legal authority to indicate such a transfer is not subject to this statutory provision.

Boulder argues that *Miller v. Public Service Company*, 272 P.2d 283 (Colo. 1954), supports its position that condemnation may occur prior to PUC approval. In *Miller*, the Public Service sought to condemn land to construct a new generating plant. *Id.* at 284. The landowner argued that Public Service could not condemn his property because Public Service had not yet obtained a certificate of necessity from the PUC. *Id.* at 285. The Colorado Supreme Court found in favor of Public Service, stating, “[t]he so-called certificate is only a permit or license to use and enjoy land that has been condemned; it is not a condition precedent to the right to condemn.” *Id.* This case does not govern the matter at hand because here the City is attempting to condemn utility infrastructure already owned by Public Service, rather than land on which to build utility infrastructure. An entity is only required to first obtain a CPCN when the property to be condemned is property over which the PUC already has authority. Here, the property to be

condemned is clearly already under PUC's authority, as a CPCN is already assigned to Public Service and therefore, Boulder must obtain a CPCN transfer prior to condemnation.

The City addressed at length its power to condemn extraterritorial property. The Court agrees the City has the power to condemn extraterritorial property, and the Respondents do not contest that fact. *See, e.g., Town of Telluride v. San Miguel Valley Corp.* 185 P.3d 161 (Colo. 2008). In *Telluride*, the Court found a statute that prohibited home rule cities from condemning extraterritorial land for open space and park purposes was unconstitutional because it abrogated the eminent domain power granted to home rule cities by article XX of the Colorado Constitution. *Id.* at 163. In a footnote, the Court stated, “[o]ur past cases indicate that, although the legislature may not *prohibit* the exercise of article XX powers, it may *regulate* the exercise of those powers in areas of statewide or mixed state and local concern. Therefore, the analysis of competing state and local interests would be appropriate in a case involving a statute which merely regulates home rule municipalities' exercise of their constitutional powers.” *Id.* at 170, n.8 (emphasis in the original).

The Court finds that *Telluride* does not provide the City unfettered power to condemn property necessary for utility municipalization. Unlike in *Telluride*, the property the City desires to condemn provides service outside of the municipality and the PUC has the authority under the Colorado Constitution, not just a statute, to govern the provision of utilities to extraterritorial customers and state interests. Boulder has a constitutional right to condemn facilities in unincorporated Boulder County for its city utility municipalization, but it does not have a constitutional right to usurp the PUC's constitutional right to regulate facilities and services that serve utility customers in unincorporated Boulder County. Further, because of the effect that transfer of the CPCN would have on extraterritorial customers, this is a matter of mixed state and local concern, which the PUC has the right to regulate as set forth above. This does not prevent the City from ultimately condemning property to municipalize the utility, but rather requires the PUC to make a determination regarding allocation prior to the condemnation.

Public Service asked the PUC to enter a declaratory judgment that the need to construct replacement facilities as a result of actions taken by a challenging utility does not constitute an inability to serve. The PUC now asks this Court to make the same declaratory judgment. The Court leaves this initial determination to the PUC, a regulatory agency that has the expertise to make such a determination.

## VI. CONCLUSION

Under the doctrine of regulated monopoly, which governs PUC regulations, Boulder and Public Service cannot simultaneously serve the same geographic region, in this case the section of unincorporated Boulder County that Boulder included in its acquisition area. Only one entity may hold the CPCN for a specific geographic location. Here, no evidence has been set forth to show that Public Service is unable or unwilling to serve unincorporated Boulder and therefore maintains a property right to do so, which the City cannot single-handedly appropriate despite its constitutional rights under Article XX of the Colorado Constitution. The City's constitutional right to eminent domain over property outside of its territory does not extend to serving those

outside the municipality. The City's constitutional right is not unfettered because the PUC has constitutional authority to regulate public utilities for those outside the municipality. This limitation provides a certain level of protection for those who have no vote, and therefore no voice, within a municipality.

The PUC has the authority to regulate public utilities and the facilities, which provide service within the City of Boulder as well as unincorporated Boulder. The City has the right to create a municipal utility to serve its citizens. These facilities are intimately intertwined. Therefore, it is necessary and appropriate for the PUC to determine how facilities should be assigned, divided, or jointly used to protect the system's effectiveness, reliability, and safety. Such a determination must be made prior to the City's condemnation of property for utility municipalization.

This finding does not abrogate the City's constitutional right to eminent domain, but rather just delays the City's constitutional right, a delay that would necessarily occur at some point in the process. By requiring the PUC to determine the allocation and transfer of assets prior to the City's condemnation, the parties avoid finding themselves in a situation where the City has condemned property to which it ultimately may not be entitled.

The Court hereby **AFFIRMS** the October 29, 2013 Decision No. C13-1350 and the December 11, 2013 Decision No. C13-1550, both issued by the PUC.

DATED: 1/14/15

BY THE COURT



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Judith L. LaBuda  
District Court Judge